

DEPARTMENT OF STATE REVENUE

04940684.SLF

FIRST SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 94-0684 ST

Claim For Refund - Sales And Use Tax

For The Period: 1990 Through 1992

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales & Use Tax — Equipment Lease

Authority: 45 IAC 2.2-4-27(d)(3)(A); Mason Metals v. Dept. of State Revenue, 590 N.E.2d 672 (Ind.Tax 1992).

Taxpayer protests the imposition of sales tax on equipment rentals to related companies.

II. Tax Administration — Collection Fees/Late Penalties

Taxpayer protests the Department's addition of collection fees after the taxpayer attempted to pay all liabilities.

III. Tax Administration — Penalty

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

This First Supplemental Letter of Findings supplements the original Letter of Findings issued December 12, 1996. Issues I and IV of the original Letter of Findings have been readdressed. Issue II of this First Supplemental Letter of Findings is an issue which was not addressed in the original Letter of Findings.

Taxpayer is a general contractor focused on developing new residential subdivisions. Taxpayer had no employees and owned no equipment. Taxpayer has always been co-owned by Owner A. When heavy equipment was needed, taxpayer would rent the equipment, with an operator, from a third party. Frequently, this third party was another business owned (partially or wholly) by Owner A. Additional relevant facts will be provided below, as necessary.

I. Sales & Use Tax — Equipment Lease

DISCUSSION

Taxpayer protests the conclusions of a prior Letter of Findings which distinguished equipment rentals from related companies as opposed to unrelated companies. The first Letter of Findings determined that "rentals" from unrelated companies were exempt from sales tax as they were found to not be rentals/leases but the provision of services. The first Letter of Findings went on to state the rentals from related companies were taxable as they were true leases, and given the common ownership of the companies, control was exercised by the lessee. Taxpayer protests this distinction, with reference to control, made between the related and unrelated companies.

Taxpayer points to 45 IAC 2.2-4-27(d)(3)(A), Mason Metals v. Dept. of State Revenue, 590 N.E.2d 672 (Ind.Tax 1992), and the Department's Sales Tax Division Information Bulletin #42. 45 IAC 2.2-4-27(d)(3)(A) makes subject to sales tax the rental or leasing of tangible personal property joined with an operator when control of the property is exercised by the lessee. Information Bulletin #42 states in part:

The renting or leasing of tangible personal property, together with the services of an operator, shall be subject to sales tax when control of the property is exercised by the lessee.

"Control" is exercised by the lessee when:

- (1) the lessee has exclusive use of the property; and
- (2) the lessee has the right to direct the manner of the use of the property.

In Mason Metals, the court analyzed whether a lessee had control (when the lessor provided a tractor and driver to haul lessee's trailer) by considering six factors:

- (1) The employment of the driver.
- (2) The right to direct movement of the bus.
- (3) Obligation to pay costs and repairs.
- (4) Obligation to pay fuel costs.
- (5) The responsibility of garaging the vehicle.
- (6) Payment of insurance and license fees.

Taxpayer claims the six factors from Mason Metals are satisfied by its transactions with related companies as well as the unrelated companies by arguing the lessor employed the operator, retained control of the equipment's movements, retained the obligation to pay for repairs and fuel, stored the equipment, and paid the insurance and licensing of the equipment.

Taxpayer argues the Department is adding a seventh factor by requiring the companies to be unrelated. The first

Letter of Findings stated,

In the cases where the taxpayer conducted business with these related companies, the lessor company and the lessee company [are] controlled by the same person, [Owner A]. Therefore, it cannot be said that the lessee lacked control and possession over the equipment.

Taxpayer argues this is not an accurate depiction of how the companies operated the rental business. Taxpayer claims that as there were minority shareholders/owners in the related companies great care was taken to operate at arms-length and maintain each companies' independence. Taxpayer also states operators were provided in every equipment lease and claims the reasons for requiring the operator to stay with the equipment (personnel safety, proper maintenance of equipment, etc.) were relevant whether it was a related or unrelated company. Taxpayer argues all equipment rental transactions should be treated comparably.

FINDING

Taxpayer's protest is sustained. Taxpayer has proven to the Department's satisfaction that the equipment rentals from related companies should be treated the same as rentals from unrelated companies and were not leases but the provision of services.

II. Tax Administration — Collection Fees/Late Penalties

DISCUSSION

Taxpayer protests the imposition of collection fees and late penalties assessed against taxpayer subsequent to its attempt to pay the sales and use tax liabilities. Taxpayer has provided the Department with evidence of its timely payment, therefore, late penalties and collection fees should not have been applied.

FINDING

Taxpayer's protest is sustained.

III. Tax Administration — Penalty

DISCUSSION

Taxpayer was assessed a ten percent negligence penalty for failure to pay sales/use tax on the above-referenced items. Given the findings in Issues I and II, the assessed penalties no longer apply.

FINDING

Taxpayer's protest is sustained.